

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

BERTON M. HOCHFELD and
HOCHFELD CAPITAL MANAGEMENT, INC.,

Defendants.

JUDGE MUKASEY
05 CV 9921
CIV.

COMPLAINT



COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiff Securities and Exchange Commission alleges and states that:

INTRODUCTION

1. This case involves violations of the anti-fraud provisions of the federal securities laws in connection with the misconduct of Defendant Berton M. Hochfeld (“Hochfeld”) which occurred while he was a research analyst at First Montauk Securities Corp. (“First Montauk”), a registered broker-dealer. In his capacity as a research analyst, Hochfeld followed companies in the enterprise software sector and regularly authored research reports which were distributed to First Montauk’s institutional customers.

2. Hochfeld’s violations resulted from his directed trading of securities in contradiction to advice he gave in his research reports, a fraudulent conduct that is commonly referred to as “scalping.” At the same time he was an analyst for First Montauk, Hochfeld also managed and directed trading for a private hedge fund called Hepplewhite Fund L.P. (“Hepplewhite”), through his wholly-owned management company, Defendant Hochfeld Capital Management, LLC

(“HCM”). Between March 27, 2003 and December 15, 2003, Hochfeld’s research reports failed to disclose that Hepplewhite maintained positions in the stocks that were the subjects of Hochfeld’s research reports. The reports also failed to disclose that on numerous occasions, Hochfeld caused trades to be made in the subject stocks immediately after the issuance of the reports, contrary to the information or recommendations in the reports.

DEFENDANTS

3. Hochfeld, age 60, was associated as a registered representative and research analyst with First Montauk’s New York branch office from March 1, 2002 until January 2004. Hochfeld was the managing director of Montauk Capital Markets Group, a division of First Montauk

4. HCM is a Delaware corporation with offices in New York, New York. HCM is the general partner of Hepplewhite and is responsible for all of its investment decisions. Hochfeld is HCM’s sole shareholder and principal.

OTHER RELEVANT ENTITIES

5. Hepplewhite is a Delaware limited partnership of which HCM is its sole general partner. Hepplewhite operates as a private hedge fund that invests mainly in publicly-traded technology companies. At all relevant times, Hepplewhite had approximately 24 limited-partner investors and a net asset value of about \$4 million as of December 31, 2003. For HCM’s services, Hepplewhite paid HCM a quarterly management fee of 1% of the value of the capital account of each limited partner of the hedge fund. HCM was also entitled to a performance allocation equal to 20% of each limited partner’s pro rata share of Hepplewhite’s net profits each fiscal year. Hepplewhite’s trades were executed through several broker-dealers, including First Montauk.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to Sections 20(b), 20(d) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(b), 77t(d) and 77v(a)], and Sections 21(d), 21(e), and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e) and 78aa].

7. Defendants, directly and indirectly, made use of the mails, the means and instrumentalities of interstate commerce, the means and instruments of transportation and communication in interstate commerce, or the facilities of a national securities exchange, in connection with the acts, practices, and courses of conduct complained of herein.

8. Venue and jurisdiction are proper in the Southern District of New York because defendants' acts and practices, which constitute violations of the federal securities laws, occurred within this District.

THE FRADULENT CONDUCT

Hochfeld's Research Reports

9. As a First Montauk analyst, Hochfeld wrote research reports on numerous companies he covered in the enterprise software sector for First Montauk's customers and prospective customers. Hochfeld's reports included commentaries called "morning notes", generally consisting of a paragraph or two on a particular stock or stocks. He also wrote lengthier reports on various stocks in response to specific events such as quarterly earnings releases. Hochfeld's research reports were typically e-mailed to thirty or forty customers and prospective customers of First Montauk, most of whom were institutional investors.

10. During 2003, some of Hochfeld's reports included "Buy", "Sell", and "Hold" recommendations concerning the stocks profiled in his reports. A "Buy" rating was defined in Hochfeld's reports as an "expected relative performance of greater than +20% in the

intermediate term.” A “Hold” rating was defined as an “expected relative performance of -10% to +10% in the intermediate term”, and a “Sell” rating was defined as an “expected relative performance of -20% or worse in the intermediate term.” The “intermediate term” time period was defined as price movement expected in “weeks to months.” Some of his reports also contained price targets on the stocks that were covered.

11. All of Hochfeld’s research reports contained a generic disclosure statement. Prior to September 2003, it read: “[First Montauk], its affiliates, and/or its officers, directors, employees or stockholders may at times have a position in, including an arbitrage or option position in, the securities described herein, and may sell or buy them to or from customers.” In September 2003, this statement was slightly altered to read: “[First Montauk], its affiliates, and/or its officers, directors, employers or stockholders may have a position in, including an arbitrage or option position in the securities described herein, and may sell or buy such securities to or from customer on either a principal or agency basis.”

Hochfeld’s Trading in the Stocks Covered in His Research Reports

12. While he was employed as a research analyst at First Montauk, Hochfeld, through HCM, also caused the execution of trades for Hepplewhite. The majority of those trades were done through First Montauk and Hochfeld received commissions on all of those trades. Between March 27, 2003 and December 15, 2003, Hochfeld engaged in a fraudulent practice of “scalping”, specifically, trading in Hepplewhite’s accounts in a manner that was contrary to the recommendations he made in his own research reports on stocks of companies he covered.

13. During 2003, on at least twenty-one instances, Hochfeld and HCM bought stock in Hepplewhite’s accounts prior to issuing positive reports on those stocks, and then sold the shares shortly thereafter. In some instances, Hochfeld caused Hepplewhite’s sale of stock

multiple times after issuance of a report, for a total of thirty-one improper sales. Nearly all the sales occurred when the price of the stock increased after a positive report.

14. Hochfeld failed to disclose in his research reports that Hepplewhite maintained positions in the stocks that were covered in his reports. Nor did he disclose that Hepplewhite would be selling stock in the companies covered in these reports shortly after the issuance of the reports, and that Hepplewhite's trading was contrary to the advice Hochfeld gave in the reports.

15. The following are some examples of the thirty-one fraudulent trades Hochfeld and HCM caused to be made through Hepplewhite's accounts:

a. Aspen Technology, Inc.

Between July 17, 2003 and August 13, 2003, Hochfeld caused Hepplewhite to purchase 28,000 shares of Aspen Technology, Inc. ("AZPN") at prices between \$2.74 and \$4.55 for the Hepplewhite account. Between August 14, 2003 and October 30, 2003, Hochfeld issued five positive reports on AZPN, including four "Buy" recommendations, and set a 52-week target price of \$9.25 in the October 30, 2003, report. The closing price of the stock on the day before the August 14, 2003 report was \$2.84, and had reached \$7.26 by the time of the issuance of the October 30, 2003, report. On November 4, 2003, just five days after setting the \$9.25 price target, Hochfeld caused Hepplewhite to sell the 28,000 shares of AZPN, plus an additional 2,000 shares it held previously, at a price of \$8.64 per share, realizing a profit of \$161,780.

b. Hyperion Solutions, Inc.

On March 21, 25, and 27, 2003, Hochfeld caused Hepplewhite to purchase a total of 3,000 shares of Hyperion Solutions, Inc. ("HYSL") at prices ranging from \$22.72 to \$23.50 per share. On March 31, 2003, he then issued a positive report on HYSL in which he said that the forecast for the next quarter was "favorable." Two days later, Hochfeld caused Hepplewhite to

sell 2,000 shares of HYSL at a price of \$25.62 per share, for a profit of \$5,427. Hochfeld then caused Hepplewhite to purchase an additional 2,000 shares on April 11, 2003 at a price of \$24.27 per share. Hochfeld then issued another positive report on April 14, 2003, stating that sales results for the company's regions were at or ahead of plan, and that he believed the company would reaffirm its financial projections. Two days later, Hochfeld caused Hepplewhite to sell 1,000 shares of HYSL at a price of \$26.31 per share, for a profit of over \$2,000.

Hochfeld repeated this pattern by causing Hepplewhite to purchase 4,600 shares of HYSL between May 21, 2003, and June 3, 2003, at prices between \$29.39 and \$31.09 per share. The next day, on June 4, 2003, Hochfeld issued a positive report stating that the quarter was shaping up "very positively" for HYSL. Hochfeld then caused Hepplewhite to sell 3,000 shares of HYSL at an average price of \$36.00 per share between June 4, 2003 and June 6, 2003, realizing a profit of \$16,368.

c. BMC Software, Inc.

On April 28 and 30, 2003, Hochfeld caused Hepplewhite to purchase 3,000 shares of BMC Software, Inc. ("BMC") at prices between \$14.87 and \$14.92 per share. On April 30, 2003, he also issued a positive report on BMC, predicting that management's previous earnings per share guidance would soon be shown to have been too conservative, and that the company's operating earnings could be \$50 million to \$100 million better than guidance. Two days after the report, Hochfeld caused Hepplewhite to sell 2,000 shares of BMC at a price of \$16.63 per share, earning a profit of more than \$3,470.

d. I2 Technologies, Inc.

On July 23 and August 1, 2003, Hochfeld caused Hepplewhite to purchase a total of 45,000 shares of I2 Technologies, Inc. ("ITWO") at prices between \$1.00 and \$1.18 per share.

On September 15, 2003, he then issued a positive report on ITWO which included a “Buy” rating. On September 17 and 19, 2003, a few days following his report, Hochfeld caused Hepplewhite to sell 24,000 shares at an average of \$1.40 per share, resulting in a profit of more than \$4,900.

e. **SAP AG**

On September 9 and 12, 2003, Hochfeld caused Hepplewhite to purchase a total of 2,200 shares of SAP AG (“SAP”) at prices between \$31.86 and \$33.56 per share. On September 16, 2003, Hochfeld then issued a positive report on SAP which included a “Buy” rating. The following day Hochfeld caused Hepplewhite to sell 1,200 shares of SAP at a price of \$33.41 per share for a profit of \$1,520.

COUNT I

**FRAUD IN VIOLATION OF
SECTION 10(b) OF THE EXCHANGE ACT AND RULE 10b-5 THEREUNDER**

16. The Commission repeats and realleges the allegations set forth in paragraphs 1 through 15 of this Complaint.

17. From March 2003 through December 2003, Hochfeld and HCM, directly or indirectly, by use of the means or instrumentalities of interstate commerce, or of the mails, or any facility of any national securities exchange, in connection with the purchase or sale of securities, as described in this Complaint, knowingly or recklessly:

- (a) employed devices, schemes or artifices to defraud;
- (b) made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and/or

(c) engaged in acts, practices and courses of business, which operated, as a fraud upon the purchasers of such securities.

18. By reason of the foregoing, Hochfeld and HCM, directly or indirectly, have violated and, unless enjoined, will continue to violate Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] thereunder.

COUNT II

FRAUD IN VIOLATION OF SECTION 17(a)(1) OF THE SECURITIES ACT

19. The Commission repeats and realleges the allegations set forth in paragraphs 1 through 15 of this Complaint.

20. From March 2003 through December 2003, Hochfeld and HCM, directly or indirectly, by use of the means or instruments of transportation or communication in interstate commerce, or by use of the mails, in the offer or sale of securities, as described in this Complaint, knowingly or recklessly employed devices, schemes or artifices to defraud.

21. By reason of the foregoing, Hochfeld and HCM, directly or indirectly, have violated and, unless enjoined, will continue to violate Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)].

COUNT III

FRAUD IN VIOLATION OF SECTIONS 17(a)(2) AND 17(a)(3) OF THE SECURITIES ACT

22. The Commission repeats and realleges the allegations set forth in paragraphs 1 through 15 of this Complaint.

23. From March 2003 through December 2003, Hochfeld and HCM, directly or indirectly, by use of the means or instruments of transportation or communication in interstate

commerce, or by use of the mails, in the offer or sale of securities, as described in this Complaint:

(a) obtained money or property by means of untrue statements of material facts and omissions to state material facts to make the statements made, in the light of the circumstances under which they were made, not misleading; and/or

(b) engaged in transactions, practices and courses of business which operated as a fraud or deceit upon purchases and prospective purchasers of such securities.

24. By reason of the foregoing, Hochfeld and HCM, directly or indirectly, have violated and, unless enjoined, will continue to violate Sections 17(a)(2) and 17(a)(3) of the Securities Act [15 U.S.C. §§ 77q(a)(2) and 77q(a)(3)].

RELIEF REQUESTED

WHEREFORE, the Commission respectfully requests that the Court:

I.

Permanent Injunctive Relief

Issue a Permanent Injunction, restraining and enjoining Hochfeld and HCM, their agents, servants, employees, attorneys, and all persons in active concert or participation with them, and each of them, from directly or indirectly violating Section 17(a) of the Securities Act [15 U.S.C. § 77q(a)], Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5].

II.

Disgorgement

Issue an Order requiring Defendants Hochfeld and HCM to disgorge all ill-gotten profits or proceeds that they have received as a result of the acts and/or courses of conduct complained of herein, with prejudgment interest.

III.

Penalties

Issue an Order directing Hochfeld and HCM to pay civil money penalties pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d) and Section 21(d) of the Exchange Act, 15 U.S.C. § 78(d)(3).

IV.

Further Relief

Grant such other and further relief as may be necessary and appropriate.

V.

Retention of Jurisdiction

Further, the Commission requests that the Court retain jurisdiction over this action in order to implement and carry out the terms of all orders and decrees that may hereby be entered, or to entertain any suitable application or motion by the Commission for additional relief within the jurisdiction of this Court.

Respectfully submitted,

November 22, 2005

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